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Nos. 06-1195 & 06-1196

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In The
Supreme Court of the United States

LAKHDAR BOUMEDIENE, et al.,

Petitioners,

v.

GEORGE W. BUSH, et al.,

Respondents.

KHALED A.F. AL ODAH, et al.,

Petitioners,

v.

UNITED STATES, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs with the courts. Because the instant cases raise vital questions about the Great Writ of habeas corpus and separation of powers principles, the case is of central concern to the Cato Institute.

STATEMENT OF THE CASE

After the terrorist attacks of September 11, 2001, the President dispatched U.S. armed forces to Afghanistan to attack al-Qaeda base camps and to subdue the Taliban regime. Since the invasion of Afghanistan, the U.S. military has taken thousands of prisoners. Most have been imprisoned at U.S. facilities in that theatre, while others have been transferred to the U.S. Naval Base at Guantanamo Bay, Cuba. The President has determined that the Guantanamo prisoners are not entitled to prisoner-of-war status under the Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 75 U.N.T.S. No. 972.

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[1] The parties consent to the filing of this *Amicus* brief have been lodged with the Clerk of this Court. In accordance with Rule 37.6, *Amicus* states that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than the *Amicus*, has made a monetary contribution to the preparation of this brief.

In 2002, several relatives of certain prisoners filed habeas corpus petitions in the U.S. District Court for the District of Columbia challenging the legality of their imprisonment at Guantanamo. These prisoners did not challenge the authority of the President and the military to take suspected members of hostile forces into custody, but they did allege that they had never been a combatant against the U.S. and that they had been denied access to counsel and access to the civilian court system. The Government responded to those claims by urging the District Court to summarily dismiss the petitions. According to the Government, recognizing jurisdiction over the prisoners' habeas claims would "intrude" on the power of both the Executive and the Congress. This Court heard this controversy in 2004. In *Rasul v. Bush*, 542 U.S. 466 (2004), this Court held that the federal habeas statute, 28 U.S.C. §2241, extends to prisoners held by the U.S. military at the Guantanamo Bay facility.

After *Rasul*, Congress modified §2241 by enacting the Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600. That law deprives courts of jurisdiction to consider habeas claims. Petitioners maintain that such deprivation is unconstitutional. The Government, in turn, renews its argument that the courts cannot "intrude" on the power of the Executive to prosecute a war or Congress's power to delineate the jurisdiction of the federal courts. Thus, this Court must now confront grave questions concerning separation of powers principles and the boundaries of the constitutional provision for the writ of habeas corpus.

SUMMARY OF ARGUMENT

To resolve the grave issue at stake in this case, this Court should start with first principles. To begin with, the Constitution does guarantee the existence of the habeas writ. Second, the writ does extend to prisoners in facilities that are not on U.S. soil. Third, this Court can and should review the validity of any act of Congress that expressly or impliedly invokes one of the exceptions to the constitutional rule against the suspension of the writ of habeas corpus.

Congress does have the power to prescribe rules affecting the writ of habeas corpus. To prevent forum shopping, for example, Congress designated a particular court to consider habeas petitions from the prison facility at Guantanamo Bay. The Constitution, however, limits Congress's power over the writ of habeas corpus. The Suspension Clause limits the revocation of habeas corpus to times of rebellion or invasion. Congress has not invoked those exceptions. Thus, the Military Commissions Act, which purports to withdraw the jurisdiction of federal courts over the Petitioners' habeas claims, is unconstitutional.

ARGUMENT

I. THE WRIT OF HABEAS CORPUS IS GUARANTEED BY THE CONSTITUTION.

This Court should begin with first principles. The writ of habeas corpus is guaranteed by the Constitution. Unfortunately, the Government seems to deny this fundamental proposition. It is not the Government's central contention in this case, to be sure, but that contention is nonetheless lurking in the background. In cryptic testimony

before the Senate Judiciary Committee, Attorney General Alberto Gonzales observed "[T]here is no express grant of habeas in the Constitution. There is [only] a prohibition against taking it away." Testimony of Attorney General Alberto Gonzales, Hearing of the Senate Judiciary Committee; Subject: Oversight of the U.S. Department of Justice (January 18, 2007). The Attorney General may well subscribe to a viewpoint that was expressed in a dissenting opinion in this Court several years ago. *See INS v. St. Cyr*, 533 U.S. 289, 337 (2001) (Scalia, J., dissenting).[2] In any event, such a cramped interpretation of the constitutional text is woefully misguided.

Article I, section 9 of the Constitution provides, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." This Court should not waver from the proposition that the habeas writ is grounded in the Constitution itself. This Court should approach the text of the Suspension Clause in light of its purpose. Consider, for example, the consequences for freedom of the press if one were to jump to the conclusion that taxation is not censorship. Special newspaper taxes could be justified with the argument that the taxes do not prohibit anyone from saying anything. The Government might also attempt to suppress the ideas expressed in newspapers by interfering with the ability of writers, reporters, and newspaper owners to coordinate and disseminate their ideas by restricting the production and delivery process.

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[2] Note also the presidential proclamation that purports to deny prisoners access to the courts. "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," Section 7(b)(2), 66 Fed. Reg. 57833.

Fortunately, this Court has interpreted the First Amendment broadly in response to such threats. *See, e.g., Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 65, n. 6 (1963) ("The constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication . . . "); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (invalidating selective taxation of the press).

Consider also the double jeopardy provision of the Fifth Amendment, which states: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." The "life or limb" proviso might conceivably be read in such as way as to permit multiple prosecutions and punishments in all of the situations in which people are facing criminal allegations that would result in "mere" imprisonment, but the courts have properly resisted such a construction as contrary to the central purpose of the provision. *See Bedlinger v. Commonwealth of Virginia*, 3 Call. 461, 468 (1803) (opinion of Roane, J.); *People v. Goodwin*, 1 Wheeler C.C. 470, 18 Johns. 187 (N.Y. Sup. 1820); *Stout v. State*, 36 Okla. 744, 130 P. 553, 557 (Okla. 1913); *Williams v. Commonwealth*, 78 Ky. 93 (1879).

Text aside, it is true that four of the state ratifying conventions objected to the proposed Constitution because the charter failed to affirmatively guarantee a right to habeas corpus, *St. Cyr*, 533 U.S. at 337 (Scalia, J., dissenting), but such historical material ought to constitute the *starting point* of an inquiry into the original understanding of the Constitution. The crucial point is to discern how the defenders of the proposed Constitution *responded* to such objections. That is, did the Federalists admit and defend the absence of a guarantee, or did they seek to rebut Antifederalist objections as unfounded or mistaken? If the latter, the appropriate conclusion is that the drafters and ratifiers of the Constitution approved the construction

offered in response. *See Missouri v. Jenkins*, 515 U.S. 70, 126-127 (1995) (Thomas, J., concurring).

Professor Gerald L. Neuman has investigated this question and he found that the Federalists "repeatedly assured their opponents that the Suspension Clause protected the writ legally, not just politically." *See* Neuman, *The Habeas Corpus Suspension Clause After* INS v. St. Cyr, 33 Colum.Hum.Rts.L.Rev. 555, 579 (2002). To begin with, when James Madison discussed trial by jury, he specifically addressed Antifederalist objections to the lack of a constitutional provision for trial by jury in civil cases. Among other things, he reasoned:

> But I must acknowledge that I cannot readily discern the inseparable connection between the existence of liberty, and the trial by jury in civil cases. Arbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions, have ever appeared to me to be the great engines of judicial despotism; and these have all relation to criminal proceedings. The trial by jury in criminal cases, aided by the habeas-corpus act, seems therefore to be alone concerned in the question. *And both of these are provided for, in the most ample manner, in the plan of the convention.* The Federalist No. 83 (emphasis added).

Other Federalists made similar representations. During the Virginia Convention, Governor Randolph stated, "That [habeas] privilege is secured here by the Constitution, and is only to be suspended in cases of extreme emergency." *See* Neumann, *supra*, at 579 n. 109 (citation omitted). During the Pennsylvania Convention, James Wilson observed that "the right of habeas corpus was secured by a particular provision in its favor." Paschal, *The Constitution and*

Habeas Corpus, 1970 Duke L.J. 605, 611, n. 23 (citing 2 Elliot's Debates at 454-455).

As Professor Neuman has noted, it would have been incongruous for the Framers of the Constitution to have designed a habeas safeguard against the majoritarian abuse of temporary suspension, while "trusting the political process to police the more egregious abuse of permanent total or partial abrogations." Neuman, *supra*, at 579 n. 109. In sum, the Attorney General's oblique contention that the Constitution does guarantee the existence of the habeas writ is without merit.

II. THE WRIT OF HABEAS CORPUS EXTENDS TO PERSONS WHO ARE IMPRISONED OUTSIDE OF THE UNITED STATES.

The Government argues that the habeas writ does not extend to persons imprisoned outside of the United States. This claim is also erroneous. It is generally true that the safeguards of the American Bill of Rights do not apply to noncitizens who are not on U.S. soil, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), but it is simply incorrect to analyze the issue in *this* case in terms of the "constitutional rights of aliens." At its core, habeas is a separation of powers principle. To be sure, habeas actions involve the prisoner, but only indirectly. The real action is between the judicial branch and the executive branch of the American government.[3] Thus, when the writ has not been suspended, a prisoner must have an opportunity to present a petition to a court that his incarceration is mistaken or

[3] *See* Richard A. Epstein, "Produce the Body," Wall Street Journal, October 7-8, 2006.

unlawful. Here, the President and the Secretary of Defense are the custodians. The fact that the prisoners are noncitizens is beside the point. So too is the location of their jail cell.[4]

This idea is hardly a novel innovation in the law of habeas corpus. *Rasul v. Bush*, 542 U.S. 466, 478-479 (2004). Indeed, Judge Cooley emphasized the jurisdictional component of the custodian in 1867. Here is an excerpt from Judge Cooley's opinion:

> "The important fact to be observed in regard to the mode of procedure upon this [habeas] writ is, that it is directed to, and served upon, not the person confined, but his jailor. It does not reach the former except through the latter. The officer or person who serves it does not unbar the prison doors, and set the prisoner free, but the court relieves him by compelling the oppressor to release his constraint. . . . This is the ordinary mode of affording relief, and if other means are resorted to, they are only auxiliary to those which are usual. *The place of confinement is, therefore, not important to the relief, if the guilty party is within reach of process, so that by the power of the court he can be compelled to release his grasp.* The difficulty of affording redress is not increased by the confinement being beyond the limits of the state [of Michigan], except as greater distance may affect it. The important question is, where is the power of control exercised?"

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[4] *Amicus* will not burden this Court by reviewing the early common law precedents. That law has already been well summarized by Judge Rogers. *Boumediene v. Bush*, 476 F.3d 981 (2007) (Rogers, J., dissenting).

In re Jackson, 15 Mich. 417, 439-440 (1867) (emphasis added). In this case, the "power of control" for prisoners held by the U.S. military is in our capital city, Washington, D.C.

There are certainly legitimate *practical* issues that will arise in habeas litigation. In previous wars, there were strong incentives for enemy personnel to remain in uniform even if there was a strong likelihood of imminent capture. Staying in uniform meant qualification for prisoner-of-war status under the terms of the Geneva Convention. That legal framework kept the vast majority of cases outside of the American court system. (A few, of course, crept in. *See In re Territo*, 156 F.2d 142 (1946)). The war with the al-Qaeda terrorist network will entail a steady influx of cases in which the Government will accuse a "civilian" of actually being an enemy combatant. With the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680, and the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, Congress has sought to address several *practical* legal problems, such as forum shopping by prisoners. However, insofar as the Military Commissions Act violates the core principles of habeas review, those statutory provisions are void.[5]

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[5] *Amicus Curiae* will not burden this Court by repeating arguments about the problems with the Combatant Status Review Tribunals. *See Boumediene v. Bush*, 476 F.3d 981, 1005-1007 (2007) (Rogers, J., dissenting). *See also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 233-236 (1995) (distinguishing an unconstitutional statute from statutes which simply reflect and confirm the courts' own inherent and discretionary powers). Further, as Judge Rogers noted below, in addition to the habeas corpus provision there are several other structural limitations on the powers of Congress, such as the Ex Post Facto Clause and the Bill of Attainder Clause, which apply broadly. Does the Government maintain that Congress can enact a bill of attainder

(Continued on following page)

The Government's case rests upon *Johnson v. Eisentrager*, 339 U.S. 763 (1950). *Amicus Curiae* respectfully submits that this case was incorrectly decided and ought to be overruled for the reasons set forth in Justice Black's dissent.[6]

III. ARTICLE III COURTS CAN AND SHOULD REVIEW ACTS OF CONGRESS THAT PURPORT TO SUSPEND THE WRIT OF HABEAS CORPUS.

The Suspension Clause clearly contemplates exigent circumstances in which the "public Safety" will require the Executive to move swiftly against persons who are perceived to be dangerous. In those situations, it is likely that the Executive will not be able to comply with constitutional norms for every search and arrest. The suspension of the writ will thus excuse otherwise illegal arrests and dragnet tactics because emergency circumstances can warrant such actions.

As long as the writ of habeas corpus is not suspended, however, the Executive must follow constitutional norms.[7]

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against, say, any European, as long as that person is not on U.S. soil? If not, why not?

[6] Justice Black wrote, "The Court is fashioning wholly indefensible doctrine if it permits the executive branch, by deciding where its prisoners will be tried and imprisoned, to deprive all federal courts of their power to protect against a federal executive's illegal incarcerations." *Johnson v. Eisentrager*, 339 U.S. 763, 795 (1950) (Black, J., dissenting). *See also* Gary Lawson, *The Constitutional Case Against Precedent*, 17 Harv.J.L.Pub.Pol'y 23 (1994).

[7] To be clear, *Amicus Curiae* does not dispute the authority of the military to kill or capture potentially hostile persons in a zone of active combat.

"Thus, it has been held that in the absence of Congressional action a writ of habeas corpus cannot be denied in a proper case even in wartime. 39 Am.Jur. 2d, Habeas Corpus, §5, p. 206 (citing *Ex Parte Stewart*, 47 F.Supp. 410 (1942)).

When Congress enacted the Military Commissions Act, it did not expressly avail itself of one of the enumerated exceptions in the Suspension Clause. Since a suspension of the writ would unquestionably be among the most stupendous measures that could be considered by members of Congress, it would be wholly inappropriate for this Court to hold that the availability of the writ could turn on so thin a reed as inadvertance or an inference from a legislative scheme. *See* Tr. of Oral Arg. 57-63, *Rasul v. Bush*, 542 U.S. 466 (2004).

But even if Congress had expressly invoked one of the enumerated exceptions to the Suspension Clause, the constitutional inquiry must continue. Article III courts can and should review the *validity* of such legislation. *Contra Hamdi v. Rumsfeld*, 542 U.S. 507, 594 n. 4 (2004) (Thomas, J., dissenting). The Framers of the Constitution could have easily written a provision that would entrust the weighty decision to suspend habeas corpus to the sole discretion of the legislature. They did not craft such a provision. Instead, the Framers established limits and prohibitions on the exercise by Congress of certain specific forms of legislative power, including the circumstances in which the Great Writ could be suspended. The Suspension Clause provides, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in *Cases of Rebellion or Invasion* the public Safety may require it." (Emphasis added). The Framers did not consider such limitations to be mere expressions of sentiment. They were to be legally enforceable limits. As Chief Justice John

Marshall noted two centuries ago, "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" *Marbury v. Madison*, 5 U.S. 137, 176 (1803). It is imperative that this Court eschew a deferential posture and stand, in words of James Madison, as an "impenetrable bulwark against every assumption of power in the Legislative or Executive." *New York Times v. United States*, 403 U.S. 713, 718-719 n. 5 (1971) (citation omitted).

CONCLUSION

The American Constitution affords our Commander-in-Chief latitude to take enemy personnel into custody in a war zone. Once the prisoners are disarmed and jailed, there is no military exigency. If the Executive elects to incarcerate a prisoner for an extended period of time, he must be prepared to persuade an Article III judge that there are good reasons for such a detention. Congress can address some of the practical problems that may arise from habeas litigation, such as forum shopping. If habeas litigation is abused or becomes excessive and burdensome, Congress can also establish a system of purely discretionary review. So long as a prisoner has the ability to petition an Article III court, and that tribunal possesses the power to review the legality of the detention, as well as the power to discharge the prisoner, the Great Writ will retain its vitality as a bulwark of liberty. *See Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Harris v. Nelson*, 394 U.S. 286 (1969).

In the instant cases, Congress overstepped the boundary established by the Suspension Clause by attempting to

withdraw federal court jurisdiction over petitions for writs of habeas corpus. For the foregoing reasons, the judgments below should be reversed.

Respectfully submitted,

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